United Nations A/60/374

General Assembly

Distr.: General
22 September 2005

Original: English

Sixtieth session
Agenda item 7 (b)
Human rights questions: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Protecting human rights and fundamental freedoms while countering terrorism*

Report of the Secretary-General

Summary

The present report is submitted pursuant to General Assembly resolution 59/191 concerning protecting human rights and fundamental freedoms while countering terrorism. It also responds to the request contained in resolution 2005/80 of the Commission on Human Rights that the United Nations High Commissioner for Human Rights report regularly to the General Assembly on the implementation of that resolution. The present report provides an overview of recent developments in the United Nations in the area of protecting human rights while fighting against terrorism and salient points emerging from an expert seminar hosted by the Office of the United Nations High Commissioner on Human Rights in June 2005 and conclusions aimed at further defending human rights in the counter-terrorism context. It notes that while States have a duty to fight against terrorism, their actions must be in accordance with international human rights, humanitarian and refugee law, which is currently not the case in many instances.

* This report was submitted after the deadline in order to reflect the most up-to-date information possible.

05-52075 (E) 101005

I. Introduction

1. The General Assembly, in resolution 59/191, reaffirmed that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, particularly humanitarian, human rights and refugee law. It also reaffirmed the obligation of States to respect certain rights as non-derogable in any circumstance and recalled that, any permissible measures derogating from the International Covenant on Civil and Political Rights (ICCPR) must be in accordance with the provisions of article 4 of the Covenant and of an exceptional and temporary nature. The Assembly called on States to raise awareness of the importance of these obligations with national authorities involved in combating terrorism.

2. The Assembly encouraged the Security Council and its Counter-Terrorism Committee to strengthen cooperation with relevant human rights bodies, in particular with the Office of the United Nations High Commissioner for Human Rights (OHCHR). It requested the human rights treaty bodies and relevant mechanisms and special procedures of the Commission on Human Rights to consider the protection of human rights and fundamental freedoms in the context of measures to combat terrorism and to coordinate their approaches as appropriate. The Assembly called on the United Nations High Commissioner for Human Rights to continue to examine the question of protection of human rights and fundamental freedoms while countering terrorism and to make general recommendations concerning the obligations of States in this regard. It also requested the High Commissioner to provide assistance and advice to States, upon their request, and relevant United Nations bodies on the protection of human rights while countering terrorism.

3. The present report is submitted pursuant to resolution 59/191, and to resolution 2005/80 of the Commission on Human Rights.

II. Recent developments in the United Nations in the area of human rights and counter-terrorism

4. In its report *A more secure world: Our shared responsibility*, the High-level Panel on Threats, Challenges and Change recommended that the United Nations develop a comprehensive strategy, respectful of human rights to respond to the threat of terrorism. In his address to the International Summit on Democracy, Terrorism and Security in Madrid on 10 March 2005, the Secretary-General outline five elements of this strategy, which are to defend human rights in the struggle against terrorism, to dissuade disaffected groups from choosing terrorism as a tactic, to deny terrorists the means to carry out their attacks, to deter States from supporting terrorist groups and to develop State capacity to prevent terrorism. In that address, the Secretary-General observed that international human rights experts were unanimous that many measures currently taken by States to counter terrorism infringe on human rights and fundamental freedoms, and cautioned that compromising human rights could not serve the struggle against terrorism; on the contrary, the respect for human rights was not only compatible with a successful counter-terrorism strategy, but was an essential element of it. An implementation task force established by the Secretary-General for this strategy met for the first time in New York on 13 July 2005.

5. In her report to the Commission (E/CN.4/2005/100), the High Commissioner for Human Rights affirmed that while States are obliged to take actions to combat terrorism, counter-terrorism measures must strictly respect human rights obligations; she too recognizes that certain counter-terrorism policies implemented today place human rights at considerable risk. Consistent with General Assembly and Commission on Human Rights resolutions, OHCHR continues to work towards ensuring the protection of human rights in the fight against terrorism.

6. At its sixty-first session, the Commission on Human Rights examined the report (E/CN.4/2005/103) submitted by the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman, appointed for one year pursuant to Commission resolution 2004/87, in which he highlighted several features of future mandate related to the relationship between human rights and the countering of terrorism. At that session, the Commission, in its resolution 2005/80, decided to appoint a special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Martin Scheinin was appointed Special Rapporteur on 28 July 2005. His mandate is contained in paragraph 14 of resolution 2005/80, and detailed in his report to the General Assembly at its sixtieth session (A/60/370).

7. In April 2005, OHCHR and the Department of Public Information reprinted the "Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism", which is currently being updated and will be reissued in due course. OHCHR has continued its dialogue with CTC and intends to deepen liaison with the CTC Executive Directorate recently appointed Human Rights Staff Expert. Together with CTC and the United Nations Office on Drugs and Crime (UNODC), OHCHR has participated in regional and national workshops on counter-terrorism measures. These include a workshop in San José from 5 to 7 October 2004, co-organized by the Inter-American Committee against Terrorism of the Organization of American States, and a mission to Paraguay from 29 November to 3 December 2004. OHCHR also participated in the Expert Workshop on "International cooperation on counter-terrorism, corruption and the fight against transnational organized crime" held in Zagreb from 7 to 9 March 2005, at which the Zagreb Declaration was adopted (A/59/754-S/2005/197).

8. The Office continued to exchange information with regional organizations. In preparation for the Secretary-General's sixth High-Level Meeting between United Nations and Regional and Other Intergovernmental Organizations on 25 and 26 July 2005, OHCHR and the Department of Political Affairs held consultations on 29 June with regional organizations on the protection of human rights in the fight against terrorism. The Office participated in the sixth High-Level Meeting, at which the Secretary-General observed the need for increased cooperation between the United Nations and regional organizations in the area of combating terrorism. At that meeting, it was agreed that participating organizations would pursue the development of a flexible mechanism to interact on the protection of human rights in counter-terrorism actions and would submit to OHCHR, as chair of the working group on that subject, specific proposals on ways in which such a mechanism could be developed, taking into account the variety of mandates and working methods of the participating organizations.

9. OHCHR provided assistance to the Sub-Commission on the Promotion and Protection of Human Rights at its fifty-seventh session, including in its sessional working group to elaborate detailed principles and guidelines concerning the promotion and protection of human rights when combating terrorism.

10. The human rights treaty bodies and special procedures continue to pay close attention to the issue of human rights and counter-terrorism within their relevant mandates and resources. In May 2005, the Committee against Torture adopted two decisions that provide important guidance in defending human rights in the counter-terrorism environment. *Agiza vs. Sweden* (CAT/C/34/D/233/2003) was the first case concerning extraordinary rendition ever adjudicated by an international human rights body. It concerned the decision of the Government of Sweden to remove to Egypt Mr. Agiza, an Egyptian national convicted in absentia for belonging to a terrorist group, based upon diplomatic assurances that he would not be tortured and would be given a fair trial. The Committee found that in the circumstances of the case it was or should have been known to the Swedish authorities that Mr. Agiza was at real risk of torture if removed to Egypt. This position was later confirmed by his treatment within Swedish jurisdiction and with the acquiescence of the Swedish police to treatment which, in the Committee's view, amounted to at least cruel, inhuman or degrading treatment. The Committee held that in the circumstances, the diplomatic assurances were insufficient to protect against the manifest risk of torture, coupled with the fact that there was no mechanism for their appropriate enforcement, and that as a result, the expulsion constituted a breach of article 3 of the Convention. The Committee also found a violation of the procedural obligation required under article 3 of the Convention to provide effective, independent and impartial review of a decision to expel. Article 22, which guarantees the right to exercise a complaint to the Committee was also frustrated by immediate execution of the expulsion. In its decision adopted on 17 May 2005 in the case of *Brada vs. France* (CAT/C/34/D/195/2002), the Committee also held that in the circumstances of the case, France had violated articles 3 and 22 of the Convention by deporting Mr. Brada to Algeria despite a real risk of torture, a position later confirmed by the domestic courts, and in breach of legally binding interim measures indicated by the Committee to stay deportation pending its final decision.

11. Some special procedures mandate holders have expressed concern over the serious impact of counter-terrorism measures on the enjoyment of human rights and fundamental freedoms. At a press conference given on 15 June 2005 during its visit to Canada, the Working Group on Arbitrary Detention expressed concern at conditions of detention under the security certificate process, in particular in regard to several of its elements that undermine detainees' rights to a fair hearing, to challenge the evidence used against them, not to incriminate themselves, and to judicial review of detention. On 23 June 2005, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Chairperson-Rapporteur of the Working Group on Arbitrary Detention issued a joint statement expressing regret at not having received an invitation to visit the detainees held in Guantánamo Bay and informing that they would, within their mandates, conduct an investigation into the situation of these detainees. The Special Rapporteur on extrajudicial, summary or arbitrary executions, in a statement issued on 20 May 2005 in the context of his request to

visit Uzbekistan, stated that he was particularly troubled by reports that the measures taken in Andijan in May had been connected to efforts to eliminate terrorists. The treaty bodies have considered the issue in their review of State Party reports under the respective treaties.

III. Human rights, counter-terrorism and states of emergency

12. In accordance with General Assembly resolution 59/191 the High Commissioner continued to examine the question of protecting human rights and fundamental freedoms while countering terrorism and made general recommendations concerning the obligation of States in this regard. OHCHR held an expert seminar on human rights, counter-terrorism and states of emergency on 27 and 28 June 2005. The seminar's main purpose was to explore ways of strengthening human rights protection in counter-terrorism measures at the national level. The four sessions of the seminar dealt with general principles of human rights in the counter-terrorism context; national experiences with states of emergency; fundamental principles of fair trial; and torture, extradition and non-refoulement.

International legal provisions relevant to protecting human rights while countering terrorism

13. During the first session, the seminar examined applicable provisions of international human rights treaties, general comments and jurisprudence of treaty bodies, and their contribution to protecting human rights in the counter-terrorism context. Particular focus was placed on the relevance of general comments Nos. 29 (2001) and 31 (2004) of the Human Rights Committee, the monitoring body of ICCPR, and recent decisions of the Committee against Torture in defending human rights in the fight against terrorism.

14. General comment No. 29, concerning derogations during a state of emergency, was adopted on 24 July 2001. Apart from spelling out the basic tenets of article 4 of the Covenant, it recognizes the general principles that should govern any derogating measure, such as necessity and proportionality, and underlines that no derogation may be made that is inconsistent with a State's other international legal obligations. It underlines that a derogation is a truly exceptional and temporary measure that may be taken only when the life of the nation is threatened. This general comment is especially valuable because it outlines rights other than those explicitly listed in article 4, paragraph 2, of the Covenant that cannot be derogated from, including those contained in humanitarian law as well as peremptory norms of international law. Of particular relevance in the context of the issue of human rights and terrorism are the following human rights: prohibitions against taking of hostages, abductions or unacknowledged detention; prohibition of the arbitrary deprivation of liberty or deviating from fundamental principles of fair trial, including the presumption of innocence; barring imposing collective punishment, and the obligation to treat prisoners humanely. General comment No. 29 also indicates that no state of emergency can justify the incitement of discrimination and no derogating measure may involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. It reaffirms that safeguards related to derogation include

the non-derogable principles of legality contained in article 15 of ICCPR and the fundamental requirements of fair trial.

15. General comment No. 31 on the nature of the general legal obligations imposed on States parties was adopted on 29 March 2004. Article 2, paragraph 1, of ICCPR obliges States to ensure Covenant rights to all individuals within their territory and subject to their jurisdictions. The general comment interprets this obligation as having extraterritorial reach where persons are within the power or effective control of the State party, even if not situated in the territory of the State party. By virtue of these responsibilities, a State party is prohibited to extradite, expel, deport or remove a person, especially when there are substantial grounds for believing there is a real risk of torture or other serious harm.

States of emergency — some national examples

16. The second session of the expert seminar complemented the discussion of general comment No. 29 by examining some national experiences with states of emergencies. It was recalled that before invoking article 4 of ICCPR, a State party had to officially proclaim a state of emergency and to act within its national constitutional and legal provisions governing such declarations and the exercise of emergency powers. The discussions revealed that where there were no constitutional or other legal provisions to guarantee that the judiciary retain its power to control during a state of emergency, there was a serious risk that the effective protection of human rights would suffer. Similarly, when the courts or legislator uncritically deferred to the executive's asserted security needs, the consequences for human rights may be serious.

17. Several national experiences revealed that national courts have often played a positive role in ascertaining the limits of executive power with regard to emergency laws. Some courts have found some laws unconstitutional because they evidenced no circumstances giving rise to a state of emergency. In other cases, some decrees were also deemed unconstitutional when they were extended, contrary to the procedures laid down in the Constitution. Still in other cases, domestic proceedings have referred to international human rights law, including general comment No. 29, as in the case of the decision of the House of Lords in *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*.

Fundamental principles of, and challenges, to fair trial

18. The third session of the seminar looked at issues regarding fundamental principles of fair trial and recalled that even in a state of emergency, the right to be tried by an independent and impartial tribunal, should be upheld, as well as the right to be heard and to challenge the legality of one's detention; the right to a defence; and the presumption of innocence. Only a court may try and convict a person for a criminal offence, and any evidence gained as a result of torture must be excluded.

19. However, while States are obliged to implement Security Council resolution 1373 (2001) by bringing terrorist suspects to justice, the legal regime to be applied to terrorist suspects is sometimes unclear and the lack of consensus on a definition of terrorism contributes to doubts over respect for the principle of legality. The session discussed ways of ensuring that the right to a fair trial is respected at the

national level. General comment No. 29 makes the important observation that where the death penalty is contemplated as a sentence, all rights to a fair trial contained in article 14 of ICCPR must be respected. Cases were cited that indicated that the combination of the prospect of an unfair trial with the sentence of the death penalty might amount to inhumane treatment. While some adjustments can be made in judicial proceedings for security concerns, any exceptions to the right to a fair trial in counter-terrorist cases must be strictly required by the exigencies of the situation.

20. The discussion of national experiences during this session further confirmed that even with these guarantees in mind, the current counter-terrorism environment is producing serious human rights violations. Even if the legal framework of a country respects rights, there are failings in practice that produce human rights violations.

Principle of non-refoulement and preventing torture in the counter-terrorism context

21. The last session of the seminar recalled that the principle of non-refoulement and the absolute prohibition of torture are peremptory norms of general international law applicable in all situations whatever the circumstances. However, in the counter-terrorism context, their application has at times been complicated, not least by the differing application by various countries. While there is genuine and legitimate concern that terrorists should not use refugee status to shield behind or to access safe havens, counter-terrorism measures must be in conformity with obligations under international refugee law, as stressed in Security Council resolution 1456 (2003). Efforts to fight terrorism should not suggest any automatic link between refugees and terrorists; such an assumption would be both unfair and prejudicial to asylum-seekers and would inappropriately restrict the rights of refugees, particularly in terms of fair assessment procedures. Moreover, such an approach is unwarranted, since the Convention relating to the Status of Refugees of 1951 already contains safeguards in its exclusion clauses and foresees the possibility to expel refugees in certain circumstances. Article 1 (F) denies refugee status to any person where there are serious reasons that he/she has committed one of the following crimes: crimes against peace, war crimes, crimes against humanity, serious non-political crimes, and acts contrary to the purposes and principles of the United Nations. A host State would therefore be acting in keeping with its obligations under the Convention if it denied refugee status to persons who are security concerns within the meaning of article 1, and could expel them under the terms of article 32. In such cases, the host State can expel the person to another country other than where he or she risks persecution as long as certain due process guarantees have been complied with. The cornerstone principle of non-refoulement obliges States not to return a refugee to a country where his or her life or liberty would be threatened on Convention grounds. Article 33, paragraph 1, applies fully in the context of extradition. The only exception to this principle is that the benefit of the Convention cannot be claimed by a refugee where he is reasonably suspected to be a danger to the security of the country which he is in, or after being convicted of a serious crime, is a danger to the community of that country. Even if these criteria are met, the exceptions to the non-refoulement principles are limited by the jus cogens prohibition of returning a person to a place where he or she is likely to be subject to torture.

22. Asylum-seekers are protected by article 33, paragraph 1 until a final decision has been taken or their status has been made. An extradition request does not render a person ineligible for determination of refugee status. The request has to be determined according to the normal asylum procedures with full due process, despite the extradition request. Since these limitation provisions restrict the fundamental right to asylum, they must be interpreted restrictively. If applied properly, they provide certain checks and balances to protect individual rights while maintaining security. The rules already existing in the Convention therefore enable States to comply with Security Council resolution 1373, which obliges States to prevent abuse of asylum by terrorist suspects.

23. The question then is whether there is a need for a formal and binding international instrument for the transfer of persons across borders due to the risk of torture or mistreatment. It was noted that some bilateral agreements on extradition are of an ad hoc nature and offer no real guarantees for due process. Moreover, there are ways to avoid formal extradition processes, such as abduction and administrative detention. On the issue of diplomatic assurances, two major problems arise -- that of sufficiency of the assurances and that of the implication that torture is commonplace in the country concerned but will not be applied in a particular case in question. The view was thus that diplomatic assurances are not sufficient and should not be given weight when a refugee is returned.

Issues identified for follow-up

24. Certain issues were identified during the seminar as requiring further attention. These include paying more attention to the rights of victims of terrorism; ensuring that general comments Nos. 29 and 31 are widely disseminated and known by those involved in counter-terrorism measures; ensuring that technical cooperation programmes in the area of counter-terrorism are comprehensive and include human rights; and examining the implications of military justice on the right to fair trial, taking into account the work of the Sub-Commission on the Promotion and Protection of Human Rights. Two practical follow-up actions were suggested. The first was to explore ways of engaging human rights and security experts together to ensure that the dual objectives of countering terrorism and ensuring respect for human rights are met in practice; and the second, to study and record best practices in the area of protecting human rights in the counter-terrorism environment.

IV. Conclusions

25. **While States have the duty to protect their citizens against terrorism, counter-terrorist measures must be in conformity with international human rights, humanitarian and refugee law. The Secretary-General, the High Commissioner for Human Rights, and many human rights experts continue to express concern that many counter-terrorism measures are infringing on human rights and fundamental freedoms.**

26. **The human rights treaty bodies and special procedures continue to pay close attention to the issue of human rights and counter-terrorism within their relevant mandates and resources. OHCHR, in accordance with General Assembly and Commission on Human Rights mandates, continues to examine**

issues and ways of defending human rights in the counter-terrorism context. It is continuing its dialogue with CTC and expects to deepen cooperation in the future.

27. **The appointment of the Special Rapporteur of the Commission on Human Rights on the promotion and protection of human rights while countering terrorism is an especially important development in the struggle to ensure that international human rights, humanitarian and refugee law are respected in the fight against terrorism.**